Desa Cargill Sdn Bhd v Lo So Jung

HIGH COURT (KOTA KINABALU) — SUIT NO BKI-22NCvC-65/6 OF 2016
MAIRIN IDANG J
9 JULY 2020

Contract — Guarantee and indemnity agreement — Liability of guarantor — Plaintiff filed suit against first and second defendants for outstanding sum — Second defendant filed counterclaim — Whether outstanding sum remained due and owed by first and second defendants to plaintiff — Whether guarantee and indemnity agreement valid and binding on second defendant

The first defendant was a customer of the plaintiff since 2008. At the requests of the first defendant, the plaintiff had supplied animal feeds to first defendant ('the goods'). Sometime in 2009, the first defendant expanded his farm and applied for credit terms. It was the plaintiff company's policy that to open a credit account with the plaintiff, the customer would need to sign a guarantee and indemnity agreement ('GIA') together with an additional guarantor. In consideration of the plaintiff supplying the said goods to first defendant, the first and second defendants agreed to be the guarantors and had signed the GIA. Due to the failure of first defendant to make payments for the goods, the plaintiff had filed this suit against both the first and second defendants for the sum of RM1,014,566.03. A judgment in default of appearance was entered against the first defendant and he was subsequently adjudged a bankrupt. The second defendant had disputed the plaintiff's claim against her and had filed her defence and also counterclaim. The issue for consideration was whether the outstanding sum of RM1,014,566.03 remained due and owed by the first and second defendants to the plaintiff.

Held, allowing the plaintiff's claim and dismissing the second defendant's counterclaim:

(1) Where such allegations were made, be they coercion, undue influence or misrepresentation, the acts must be specifically alleged. Where there was lacking in particulars of the allegations, the second defendant was subsequently not permitted to submit on the same. The second defendant could not really dispute that she had signed the GIA, although she alleged that the contents of the GIAs was not explained to her. Illiteracy of those signing was not a defence, neither their failure to read or that they were carless or not bothered to find out the contents of a documents, or that they relied completely upon others to complete the

A same; they would still be held responsible for their own actions and were prevented from denying that the contents of the document do not bind them (see paras 11 & 13).

(2) The second defendant had not pleaded that her liability was up to
B RM200,000 only. The court therefore need not consider this. Clause 1 of the GIA showed there was a consideration where the plaintiff had supplied the products to the first defendant on credit terms. Further, the second defendant shall be deemed to be the principal debtor for all moneys. This was expressly provided under cl 2.3 of the GIA. The second
C defendant was therefore liable to the plaintiff (see paras 18–19).

(3) The second defendant admitted to receiving the letter of demand in her witness statement which was served at the address as stated in the said GIA and on their NRIC. The plaintiff also submitted that the writ of
D summons was personally served on both the first and second defendants and that there was a principal debtor under cl 2.3 of the GIA. Therefore, the allegation of no demand made was without basis (see paras 22–24).

(4) The first defendant merely had not applied for license/renewal of trading at District Council Papar. There was no evidence suggesting that the first
E defendant did not have trading license when the GIA was signed in 2009. There was no evidence led by the second defendant that Animal Welfare Enactment 2015 was retrospective. Since the GIA was signed in 2009, this legislation was not applicable to the first defendant. Therefore, the alleged illegality was without any basis (see paras 28–30).

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[Bahasa Malaysia summary

Defendan pertama adalah pelanggan plaintif sejak tahun 2008. Atas permintaan defendan pertama, plaintif telah membekalkan makanan haiwan kepada defendan pertama ('barang'). Suatu ketika pada tahun 2009, defendan
G pertama mengembangkan ladangnya dan memohon terma kredit. Adalah menjadi polisi syarikat plaintif bahawa untuk membuka akaun kredit dengan plaintif, pelanggan perlu menandatangani perjanjian cagaran dan tanggung rugi ('GIA') bersama dengan penjamin tambahan. Dengan pertimbangan plaintif memberikan barang tersebut kepada defendan pertama, defendan
H pertama dan kedua bersetuju menjadi penjamin dan telah menandatangani GIA. Oleh kerana kegagalan defendan pertama membuat pembayaran untuk barang tersebut, plaintif telah mengemukakan saman ini terhadap kedua-dua defendan pertama dan kedua dengan jumlah wang berjumlah RM1,014,566.03. Penghakiman ingkar kehadiran telah dijatuhkan terhadap
I defendan pertama dan dia kemudian dihukum bankrap. Defendan kedua telah mempertikaikan tuntutan plaintif terhadapnya dan telah mengemukakan pembelaannya dan juga tuntutan balas. Isu untuk pertimbangan adalah sama ada jumlah tertunggak berjumlah RM1,014,566.03 masih belum dibayar dan terhutang oleh defendan pertama dan kedua kepada plaintif.

Diputuskan, membenarkan tuntutan plaintif dan menolak tuntutan balas defendan kedua:

(1) Di mana tuduhan dibuat, sama ada paksaan, pengaruh yang tidak wajar atau penyataan yang salah, tindakan tersebut mesti dituduh secara khusus. Sekiranya tidak ada perincian mengenai tuduhan tersebut, defendan kedua akibatnya tidak diizinkan untuk mengemukakannya. Defendan kedua tidak dapat benar-benar mempertikaikan bahawa dia telah menandatangani GIA, walaupun dia mendakwa bahawa kandungan GIA tidak dijelaskan kepadanya. Buta huruf dari mereka yang menandatangani itu bukan pembelaan, juga kegagalan mereka membaca atau bahawa mereka cuai atau tidak menghiraukan untuk mengetahui kandungan dokumen, atau bahawa mereka bergantung sepenuhnya kepada orang lain untuk menyelesaikannya; mereka masih akan bertanggungjawab atas tindakan mereka sendiri dan dihalang untuk menyangkal bahawa kandungan dokumen tersebut tidak mengikatnya (lihat perenggan 11 & 13).

(2) Defendan kedua tidak memplid bahawa liabilitinya hanya berjumlah RM200,000. Oleh itu mahkamah tidak perlu mempertimbangkan perkara ini. Klausa 1 GIA menunjukkan terdapat pertimbangan di mana plaintif telah membekalkan produk tersebut kepada defendan pertama dengan terma kredit. Selanjutnya, defendan kedua akan dianggap sebagai penghutang utama bagi semua wang. Ini dinyatakan dengan jelas di bawah klausa 2.3 GIA. Oleh itu, defendan kedua bertanggungjawab ke atas plaintif (lihat perenggan 18–19).

(3) Defendan kedua mengaku telah menerima surat tuntutan dalam keterangan saksi yang diserahkan di alamat seperti yang dinyatakan dalam GIA tersebut dan di kad pengenalan mereka. Plaintif juga mengemukakan bahawa writ saman disampaikan secara peribadi kepada defendan pertama dan kedua dan bahawa terdapat penghutang utama di bawah klausa 2.3 GIA. Oleh itu, tuduhan tidak ada tuntutan yang dibuat adalah tanpa asas (lihat perenggan 22–24).

(4) Defendan pertama hanya tidak memohon lesen/pembaharuan perdagangan di Majlis Daerah Papar. Tidak ada bukti yang menunjukkan bahawa defendan pertama tidak memiliki lesen perdagangan ketika GIA ditandatangani pada tahun 2009. Tidak ada bukti yang dikemukakan oleh defendan kedua bahawa Enakmen Kebajikan Haiwan 2015 adalah retrospektif. Oleh kerana GIA ditandatangani pada tahun 2009, undang-undang ini tidak terpakai untuk defendan pertama. Oleh itu, tuduhan tidak sah itu adalah tanpa asas (lihat perenggan 28–30).]

Cases referred to

AWC Berhad (formerly known as AWC Facility Solutions Berhad) v Point-Euro Malaysia Sdn Bhd & Ors [2012] MLJU 474, HC (refd)

A *Aseambankers Malaysia Berhad & Ors v Shencourt Sdn Bhd* [2013] MLJU 1553; [2014] 2 CLJ 773 (refd)
Chai Then Song v Malayan United Finance Bhd [1993] MLJU 128; [1993] 2 CLJ 640, HC (refd)
Credit Corporation (M) Berhad v Choi Sang & Anor [1989] 1 CLJ Rep 440, HC (refd)
B *Daiman Development Sdn Bhd v Mathew Lui Chin Teck & Anor* [1981] 1 MLJ 56, PC (refd)
Mieco Manufacturing Sdn Bhd v Yu Kheng Lai [2014] MLJU 629, HC (refd)
Narayanan s/o Ponnusamy v Kannamah d/o Ponnusamy [1993] 4 CLJ 389, HC
C (refd)
Rajang Plywood Sawmill Sdn Bhd v Jangkar Enterprise Sdn Bhd [2013] BLR 57, CA (refd)
Saiman Umar v Lembaga Pertubuhan Peladang [2015] 6 MLJ 492, FC (refd)
Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1; [2015] 8 CLJ
D 944, FC (refd)
Tenaga Nasional Bhd v Ichi-Ban Plastic (M) Sdn Bhd and other appeals [2018] 3 MLJ 141; [2018] 3 CLJ 557; [2018] 1 LNS 141, FC (refd)

Legislation referred to

E Animal Welfare Enactment 2015 s 5(1), (2)
Bankruptcy Act 1967 (now Insolvency Act 1967)
Companies Act 1965
Debtors Act 1957
F Rules of Court 2012 O 59
Rules of the High Court 1980
Subordinate Court Rules 1980
Trades Licensing Ordinance (Cap 144) ss 1, 2

(Chee & Co) for the plaintiff.
G *(Serena Liew & Assoc) for the defendant.*

Mairin Idang J:

INTRODUCTION

H

[1] The first defendant was a customer of the plaintiff since 2008. At the requests of the firstdefendant, the plaintiff had supplied animal feeds to first defendant (goods). Sometime in 2009, the first defendant expanded his farm and applied for credit terms. It is the plaintiff company's policy that to open a
I credit account with the plaintiff, the customer would need to sign a guarantee and indemnity agreement together with an additional guarantor. In consideration of the plaintiff supplying the said goods to first defendant, the first and second defendants agreed to bethe guarantors and had on the 21 April 2009 signed the guarantee and indemnity agreement. Due to the failure of first

defendant to make payments for the goods, the plaintiff had filed this suit against both D1 and D2 for the said sum of RM1,014,566.03 (the said sum). A judgment in default of appearance was entered against first defendant on the 22 June 2016 and he was subsequently adjudged a bankrupt on the 3 April 2017. The second defendant had disputed the plaintiff's claim against her and had filed her defence and also counterclaim.

THE SUIT

[2] In this suit the plaintiff sought against both defendants the following prayers:

(a) the sum of RM1,014,566.03;

(b) statutory interest on the sum of RM1,014,566.03 or any part thereof at the rate of 5%pa from the date of judgment to the date of full payment;

(c) costs pursuant to O 59 of the Rules of Court 2012; and

(d) further or other relief that this honourable court may deem fit to grant.

THE COUNTERCLAIM

[3] D2 had counterclaimed against the plaintiff and the first defendant for:

(a) a declaration that the guarantee and indemnity agreement dated 21 April 2009 is null and void and of no legal effect;

(b) further and in the alternative, a declaration that the guarantee and indemnity agreement dated 21 April 2009 is null and void and of no legal effect for uncertainty;

(c) a declaration that the guarantee and indemnity agreement dated 21 April 2009 was entered by the second defendant based on misrepresentation of the plaintiff's agent or servant or representative and/or thee first defendant;

(d) a declaration that the guarantee and indemnity agreement dated 21 April 2009 was procured by the first defendant by coercion and/or undue influence over the second defendant;

(e) general, aggravated and exemplary damages to be paid by the plaintiff and/or the first defendant to the second defendant for the misrepresentation;

(f) general, aggravated and exemplary damages to be paid by the first defendant to the second defendant for the coercion and/or undue influence;

(g) interest thereon at the ratee of five per centum (5%)pa from the date hereof to the date of full realization;

(h) costs on a full indemnity basis; and

(i) such other reliefs that this honourable court may deem fit and just.

DOCUMENTS

[4] At start of the trial the following documents were marked:

(a) bundle of pleadings — marked as BOP;

(b) plaintiff's bundle of documents — Part 1 and Part 2 — marked as PBOD1(A) and PBOD1(B) (only in respect of existence, contents to be proven);

(c) plaintiff's bundle of document No 2 — marked as PBOD2 (only in respect of existence, contents to be proven);

(d) plaintiff's bundle of document No 3 — marked as PBOD3 (only in respect of existence, contents to be proven);

(e) defendant's bundle of documents — marked as DBOD (only in respect of existence, contents to be proven);

(f) defendant's supplementary bundle of documents — marked as DSBOD (disputed both as to authenticity and contents);

(g) plaintiff's amended writ (encl 63) and the defendant's amended statement of defence and counterclaim (encl 60) — marked as SBOP; and

(h) agreed issues to be tried (encl 66) — marked as AIT.

WITNESSES

[5] During the trial the following witnesses gave evidence:

(a) Lo Foh Choi — 'PW1-WS';

(b) Oliver M Alantas — 'PW2-WS';

(c) Paul Dannie Ratu Aron — 'PW3-WS';

(d) Stephenie Freddy Soo Sing Ying — 'PW4-WS'; and

(e) Liaw Thin Yin — 'DW1-WS'.

AGREED ISSUES

[6] The agreed issue for trial are as follows:

(i) whether the outstanding sum of RM1,014,566.03 remains due and owing by the first and second defendants to the plaintiff? A

The legal effect of agreed issues

[7] Since the parties had agreed issues for trial, I would state that the position of agreed issues which had been discussed in the case of *Rajang Plywood Sawmill Sdn Bhd v Jangkar Enterprise Sdn Bhd* [2013] BLR 57) where His Lordship David Wong Dak Wah J (as he then was) had this to say: B

> [6] ... the parties through their counsels had given the court a set of agreed facts and agreed issues in encl 98. The legal effect of encl 98, in my view, is that the parties are bound by what they have stated there and the court must in turn based its decision on what have been agreed as to the facts and issues. C

PLEADINGS D

[8] Next, I will also say something about pleadings. It has been held that the court should not decide on issues not pleaded by the parties (see *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1; [2015] 8 CLJ 944, *Aseambankers Malaysia Berhad & Ors v Shencourt Sdn Bhd* [2013] MLJU 1553; [2014] 2 CLJ 773, *Saiman Umar v Lembaga Pertubuhan Peladang* [2015] 6 MLJ 492). The Federal Court in the case of *Tenaga Nasional Bhd v Ichi-Ban Plastic (M) Sdn Bhd and other appeals* [2018] 3 MLJ 141; [2018] 3 CLJ 557; [2018] 1 LNS 141 had held as follows: E

> ... Parties are required to set out the factual basis of their respective cases in the pleadings. The most important purpose of pleadings is to plead reasonable cause of action, define the issues of fact and questions of law to be determined by the court (see *Saiman Umar v Lembaga PertubuhanPeladang* [2015] 6 MLJ 492; [2015] 9 CLJ 153). Pleadings enable both parties to know in advance the averments being made against them so that they will not be taken by surprise during the trial ... F G

DISCUSSION OF THE AGREED ISSUES

[9] We now deal with the issues. I am of the view issues (i) to (v) can be dealt together (the five issues): H

(i) whether the alleged guarantee and indemnity agreement dated 21st April 2009 was and is at all material time valid and binding on the second defendant?

(ii) whether there was any consideration moving from the plaintiff to support the alleged guarantee and indemnity agreement? I

(iii) whether there was any misrepresentation on the part of the plaintiff's agent or staff or representative and/or the first defendant?

A (iv) whether the alleged guarantee and indemnity agreement was procured by coercion and/or undue influence and therefore void and of no legal effect whatsoever? and

(v) whether the alleged guarantee and indemnity agreement was and is at all material times null and void for uncertainty and vagueness of the terms and conditions contained therein?

[10] The five issues require us to consider whether the guarantee and indemnity agreement dated 21 April 2009 ('GIA') is valid and binding on the second defendant. The second defendant had pleadedlack of consideration,misrepresentation, coercion and/or undue influence, uncertainty and vagueness of the terms and conditions of the GIA that would invalidate or make the GIA null and void. The second defendant had also raised the requirement of demand and illegality which I will deal in the later part of this judgment.

[11] In the second defendant's defence, she had generally particularized the alleged coercion, undue influence, uncertainty and vagueness of the terms and conditions of the GIA but not misrepresentation. It is my view that where such allegations are made, be they coercion,undue influence or misrepresentation, the acts must be specifically alleged; in what manners they were done; such allegations should also not be expressed in general and ambiguous terms that are likely to be embarrassing and prejudicial to the plaintiff. Where there is lacking in particulars of the allegations, the second defendant is subsequently not permitted to submit on the same since it is trite law that parties are bound by their pleadings.

[12] The document that is being challenged here is the GIA. According to PW1, the plaintiff uses only one standard form of guarantee and indemnity agreement for either individual or company (lines 1173–1184 p 54 NOP). Now like all contracts, a contract of guarantee and indemnity must be premised on all the ingredients of a contract, in that there must be offer and acceptance and the agreement must be supported by consideration. The question whether parties have entered into contractual relationships with each other essentially depends upon the proper understanding of the expressions they have employed in communicating with each other considered against the background of the circumstances in which they have been negotiating, including in those circumstances the provisions of any applicable law. Where they have expressed themselves in writing the proper construction of the writing against that background will answer the question (*Daiman Development Sdn Bhd v Mathew Lui Chin Teck & Anor* [1981] 1 MLJ 56 (PC)).

[13] The evidence showed that the second defendant cannot really dispute that she had signed the GIA (line 2319 p 105 NOP), although she alleged

thatthe contents of the GIAS was not explained to her (DW1 evidence line 2133 p 97 NOP). Now it had been decided that illiteracy of those signing is not a defence, neither their failure to read or that they were carless or not bothered to find out the contents of a documents, or that they relied completely upon others to complete the same; theywould still be held responsible for their own actions and are prevented from denying that the contents of the document do not bind them (see of *Mieco Manufacturing Sdn Bhd v Yu Kheng Lai* [2014] MLJU 629, *AWC Berhad (formerly known as AWC Facility Solutions Berhad) v Point-Euro Malaysia Sdn Bhd & Ors* [2012] MLJU 474 and *Chai Then Song v Malayan United Finance Bhd* [1993] MLJU 128; [1993] 2 CLJ 640).

[14] Further, in the GIA, there is also this 'IMPORTANT NOTICE' at the signing page of the said GIA stating: 'Please take note that signatories to this document may be held liable instead of the Company/together with the Company to DESA CARGILL SDN BHD (Co No 184438-T) for the amount due by the Company to the above company and guaranteed/secured by this document. Signatories to this document are advised to seek independent legal advice before signing this document (PBOD1(A) p 4).

[15] I am of the view that the narrative and consideration of those case law referred to therein have answered the second defendant's allegation of coercion, undue influence, uncertainty and vagueness of the terms and conditions of the GIA and misrepresentation (see *Mieco Manufacturing Sdn Bhd v Yu Kheng Lai* [2014] MLJU 629, *AWC Berhad (formerly known as AWC Facility Solutions Berhad) v Point-Euro Malaysia Sdn Bhd & Ors* [2012] MLJU 474 and *Chai Then Song v Malayan United Finance Bhd* [1993] MLJU 128; [1993] 2 CLJ 640).

CONSIDERATION

[16] But the second defendant had also pleadedthat there was no consideration moving from the plaintiff to support the GIA. She submitted this; that consideration is a prerequisite to the formation of a valid contract and that an agreement made without consideration is void. The second defendant contention is that she is not liable for the debts incurred prior to 2009 as the GIA was entered in 2009 for thedebts incurred by the first defendant from 2008 onwards.Alternatively, the second defendant also submitted that if at all she was liable, her liability is only up to the sum of RM200,000 since the total credit limit approved by the plaintiff to the first defendant is RM200,000 only.

[17] The plaintiff submitted that there was consideration moving from the plaintiff to support the said GIA in that the plaintiff had at all material times supply and continued to supply goods and products (animal feeds) to the first defendant pursuant to the said GIA. It was also submitted that the

A firstdefendant was then purchasing the animal feeds on a cash on delivery basis therefore there was no outstanding sum due and owing to the plaintiff prior to 21 April 2009 and that the execution of the said GIA was for the opening of a credit account wherein the debt began to accumulate up to the outstanding sum of RM1,014,566.03 which remains due and owing by the defendants to
B the plaintiff.

[18] First I will quickly address the alleged limit of liability of the second defendant. My reading of the defence of the second defendant showed that she had not pleaded that her liability was up to RM200,000 only. I therefore need
C not consider this. As for the allegation of no consideration, I start byreproducing cl 1 of the GIA 'In consideration of you upon my/our joint and several requests had and/or having supplied and/or continuing to supply the Products or otherwise gave and/or giving and/or continuing to give credit the
D Debt to the Company. I/WE HEREBY JOINTLY AND SEVERALLY ACKNOWLEDGE, AGREE, UNDERTAKEAND COVENANT with you and your successors-in-title and assigns that I/we and my/our successors-in-title hereinafter will at all time unconditionally and irrevocable guarantee the due performance of the Company and keep you indemnified
E against all losses actions proceedings claims demands costs damages and expenses including legal charges on a Solicitors and Own Client's basis which you may sustain or incur by reason of you having supplied the Products and/or giving credit the Debt or resulting from any failure negligence refusal by and/or any omission inability of the Company to perform and observe the covenants
F obligations and undertakings on its part to be performed and observed contained in the statement of accounts, invoices, delivery orders, purchase orders and/or other relevant documents (collectively 'the Sale Documents') in particular the payment of all sums of money and interests at the agreed rate payable by the Company to you under the Sales Documents and shall on
G demand by you pay all such monies due and payable by the Company to you'.

[19] My reading of cl 1 above showed there is a consideration '*for the plaintiff having supplied and/or continuing to supply the Products or otherwise gave and/or*
H *giving and/or continuing to give credit the Debt to the Company*'. The evidence showed that the plaintiff had supplied the products to the first defendant on credit terms which amounted to RM1,014,566.03 for which a judgment in default was obtained. Further, the second defendant (DW1) shall be deemed to be the principal debtor for all moneys. This is expressly provided under cl 2.3
I of the said GIA. The second defendant is therefore liable to the plaintiff. (Emphasis added).

NO VALID PREREQUISITE DEMAND

[20] The second defendant submitted that under cl 1 of the GIA, a demand must be made by the plaintiff before the second defendant could be made liable for the alleged debt which was confirmed by PW1 as a condition precedent that a demand letter shall be served on both of the first and second defendants (lines 489–493 p 22 NOP). The second defendant alleged that there was no proof that there was demand made to her to pay the alleged debt though the second defendant admitted she was served with the writ of summon and that she was aware of such claim by the plaintiff.

[21] The plaintiff submitted that it had complied with the requirements set out in the GIA wherein cl 2.11 stated 'that any correspondence notice or demand for payment made in writing and may be signed on your behalf by your Manager, Assistant Manager, Accountant or any other duly authorised officer or by any Solicitor or firm of Solicitors acting or purporting to act for you shall be deemed to have been given if served on me/us personally or sent to me/us by prepaid ordinary post and any legal process which includes writ of summons and other pleadings as well as other forms of originating process, interlocutory proceedings of whatever nature affidavits, order and such documents other than the aforesaid which are required to be served under the Rules of the High Court 1980, Subordinate Court Rules 1980, Companies Act 1965, Bankruptcy Act 1967, Debtors Act 1957 or any other statute and the rules made thereunder may be sent to me/us by prepaid registered post to the address as stated herein or at my/our usual or last known business or private address, and the same shall be deemed to be duly served and received by me/us upon the expiry of five days after the time of such posting'.

[22] The evidence showed that the second defendant admitted to receiving the letter of demand in her witness statement (see p 4 DW1-WS) which was served at the address as stated in the said GIA and on their NRIC (p 17 lines 368–372 of the NOP). The plaintiff also submitted that the writ of summons dated 1 June 2016 was personally served on both the first and second defendants.

[23] The plaintiff submitted that there is a principal debtor under cl 2.3 of the GIA and had referred to the case of *Credit Corporation (M) Berhad v Choi Sang & Anor* [1989] 1 CLJ Rep 440, where it was held: 'The law on the effect of the presence of a principal debtor clause in a guarantee is clear in that it obviates the necessity of a creditor to make a demand. The guarantee is no longer a collateral agreement and as such there is no need for a demand as the issuance of the writ is a demand in itself. Where a guarantee contains both a written demand clause and a principal debtor clause, the latter overrides the condition precedent of a written demand'.

A **[24]** Having considered the evidence and the position of the principle debtor clause, the allegation of no demand made is without basis.

ILLEGALITY

B **[25]** The second defendant had raised illegality of the operation of the chicken farm operated by the first defendant. The second defendant submitted there was no valid trading license issued by the District Council Papar (p 6 of DSBOD(C)) and the firstdefendant was also required to apply for a licence from the Director of Veterinary Services and Animal Industry under s 5(1) and C (2) of the Animal Welfare Enactment 2015.

[26] The plaintiff's submission is this. That it was not in the position to know or enquire from their customers whether or not their business is legal or D illegal. The plaintiff's business is only for the supply of animal feed. If a customer comes to the plaintiff and orders animal feed, the plaintiff will in its course of business supply them with animal feed. This is a situation of a willing buyer and willing seller.

E **[27]** Let me say that where illegality is raised the court can consider the same even it is not pleaded (*Narayanan s/o Ponnusamy v Kannamah d/o Ponnusamy* [1993] 4 CLJ 389).

[28] The trading license is issued by the respective District Council under F the Trades Licensing Ordinance (Sabah Cap 144). The purpose of trading license issued by the District Council is to grant permission to the trader to carry on a particular trade on a particular address (s 1). Business means any trade or industry not exempted from the provisions of this ordinance but does not include the practice of a profession (s 2). My reading of the letter dated 16 G March 2018 (p 6 of DSBOD(C) merely showed the first defendant had not applied for license/renewal of trading at District Council Papar. There is no evidence suggesting that the first defendant did not have trading license when the GIA was signed in 2009. The burden is on the second defendant to show H this since such was her allegation. The plaintiff also submitted that it was not the plaintiff company's policy to request for and/or verify their customer's trading license (p 24 lines 536–540 of the NOP).

[29] The Animal Welfare Enactment 2015 and came into effect on the 2 I January 2016. There was no evidence led by the second defendant that this piece of legislation is retrospective. Since the GIA was signed in 2009, this legislation is not applicable to the first defendant.

[30] In view of the above, the alleged illegality is without any basis.

[31] On the balance of probabilities, the plaintiff has proven agreed issues (i) and (ii). I therefore answer the agreed issues (i) and (ii) in the positive. The second defendant has not on balance of probabilities proven agreed issues (iii), (iv) and (v). Agreed issues (iii), (iv) and (v) are answered in the negative.

(vi) Whether the outstanding sum of RM1,014,566.03 remains due and owing by the 1st and 2nd Defendants to the Plaintiff?

[32] In view of my decision in the five issues this agreed issue is answered in the positive.

[33] Having considered the evidence and submissions, I have answered the six agreed issues accordingly; on balance of probabilities, the plaintiff has proven its claim against the second defendant. In view of my decision in respect of the plaintiff's claim, the second defendant's counterclaim is dismissed. I therefore order in terms of prayer (a), (b) and (c) costs of RM30, 000 and allocator fees of 4% of the costs.

Plaintiff's claim allowed and second defendant's counterclaim dismissed.

Reported by Nabilah Syahida Abdullah Salleh